United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7493

To be argued by
JOSEPH ARTHUR COHEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",

Third Party Plaintiff-Appellant,

—against—

GTE INTERNATIONAL, INC.,

Third Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MADELEINE LONDON, being duly sworn, deposes and says:

That he is over eighteen years of age and is not a party to the within action. That on the 18th day of December, 1975, he served a true copy of the annexed

BRIEF [redacted] OF APPELLEE

on

BURLINGHAM, UNDERWOOD & LORD, ESQS.,
25 Broadway
New York, N.Y.

herein, by depositing a true copy of the aforesaid properly enclosed in a securely sealed and postpaid wrapper in a Post Office box under the exclusive care and custody of the Government of the United States, at 801 Second Avenue, in the Borough of Manhattan, City and State of New York, addressed to the aforesaid as above stated, and that said address(es) was (were) the address(es) designated by the said attorney(s) as the address(es) within the State of New York, where papers in this action might be served.

Madeleine London

Sworn to before me this
18th day of December, 19 75

Mark R. Bower

Notary Public

MARK R. BOWER
Notary Public, State of New York
No. 41-4500372
Qualified in Queens County
Commission Expires March 30, 1977

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Statement of the Case

The two crates in question containing parabolic antennas were part of an order for certain electronic equipment ordered from Appellee (hereinafter GTE) by Oilfield Supplies and Service (GTE Exhibit "A" in Evidence, Appellee's Appendix p. 9).* As GTE was essentially a sales operation, it ordered these parabolic antennas from one of its wholly owned manufacturing subsidiaries, Lenkurt Electric Co. of Canada, Ltd., a Canadian corporation

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* As the "Appendix" printed by Appellant contains none of the proof on trial, Appellee has printed pertinent portions of the same in what it denominates and refers to herein as "Appellee's Appendix".

(hereinafter LENKURT) (Appellee's Appendix, p. 5). LENKURT did not manufacture this particular kind of parabolic antenna and it ordered the same from an unaffiliated independent contractor, Ainslie Antenna Company Ltd., hereinafter AINSLIE (GTE Exhibit "B", Appellee's Appendix pp. 2, 11). As that purchase order to AINSLIE indicates, "Export Packing" for the said parabolic antennas was also ordered from AINSLIE by LENKURT, and the order contained an additional price or charge for that "Export Packing".

The invoice from AINSLIE to LENKURT (GTE Exhibit "E" in Evidence, Appellee's Appendix p. 17) reflects that LENKURT was in fact billed an additional $90 by AINSLIE for the "Export Packing" of the two antennas.

There was undisputed testimony that in Canadian industry the term "Export Packing" means conformity to the guidelines or standards established by the Canadian Military (Appellee's Appendix p. 6).

As the opinion of Judge Griesa indicates (Appendix p. 17a), the two parabolic antennas in question were shipped directly from AINSLIE's plant to the pier in question where they arrived on or about March 29, 1970 (Appellee's Appendix pp. 4, 13) and were loaded onto the vessel in question by Universal on April 11, 1970. At no time were either the parabolic antennas or their crates in the possession or even the view of GTE (Appellee's Appendix p. 2).

As earlier stated, GTE itself did not manufacture this particular type of parabolic antenna. The uncontradicted proof showed that for several years prior to this particular order, and for a couple of years subsequent thereto, LENKURT had ordered and purchased this particular type of parabolic antenna from AINSLIE (Appellee's Appendix p. 5). AINSLIE enjoyed a good reputation and LEN-

KURT never received any complaints about AINSLIE'S work during the years of their business relationship (Appellee's Appendix pp. 5-6).

As stated in Judge Griesa's opinion (Appendix p. 21a) the negligence claim against GTE was submitted to the jury on a single basis, to wit, whether GTE was negligent in contracting to AINSLIE because it was on notice of some inability or incompetence on the part of AINSLIE to properly pack the antennas for export. The jury found GTE so negligent.

GTE then moved for judgment n.o.v. (Appellee's Appendix p. 18) on the grounds that there was no *substantial basis* in the evidence to support the verdict, *Collins* v. *Craven,* 52 F.R.D. 146 (1971); and *Houston Chronicle Publishing Co.* v. *United States,* 481 F.2d 1240, 1264 (5 Cir. 1973), cert. den. 94 S. Ct. 867.

In agreeing with GTE's contention that the evidence presented no substantial basis to support a finding of negligence in the selection of AINSLIE, Judge Griesa wrote (Appendix p. 22a):

> "I now hold that there was not the slightest evidence to support such a finding. There was no evidence whatsoever to indicate that GTE or Lenkurt had notice of anything which would give them reason to believe that Ainslie was incapable of packing these antennas properly for export shipping as directed. Indeed, the only evidence on the point is that Lenkurt had previously ordered such antennas from Ainslie, both for domestic and export shipment, and never experienced any difficulties."

The Issue on Appeal

As formulated by Appellant on Page 1 of its brief, the issue on appeal is whether there was "sufficient evidence" of fault on the part of GTE so that Judge Griesa erred in granting GTE's motion for judgment n.o.v.

Although presenting the sufficiency of the evidence as the sole issue on appeal, Appellant does not include in its Appendix any of the evidence adduced on trial. There is thus an initial question as to whether Appellant's Appendix is adequate to present a question of the sufficiency of the evidence, see *Chernack* v. *Radlo,* 331 F. 2d 170 (1 Cir. 1964); *Calo* v. *U.S.* 338 F. 2d 793 (1 Cir. 1964); *Carabellese* v. *Naviera Aznar, S.A.,* 285 F. 2d 355, 361 (2 Cir. 1960); and *United States* v. *Lefkowitz,* 284 F. 2d 310 (2 Cir. 1960).

POINT I

The Motion for Judgment N.O.V. Was Properly Granted.

Even on a defendant's motion for judgment notwithstanding the verdict, a plaintiff, although entitled to the benefit of whatever favorable inferences can be drawn from the evidence, still has the burden of showing that a prima facie case exists, *Hallmark Industry* v. *Reynold Metals Company,* 489 F. 2d 8 (9 Cir. 1973), cert. den. 94 S. Ct. 2643. As there was a complete absence of proof in this case to show that AINSLIE was a contractor unable to properly construct a case for export shipment, and that GTE knew of any such inability, Nederland Lines had not made out a *prima facie* case of negligence on the theory of liability submitted to the jury.

A jury may not be permitted to "speculate in a void of evidence", *Mann* v. *Bowman Transportation Inc.*, 300 F. 2d 505, 509 (4 Cir. 1962). Nor do conjecture and guess qualify as factual proof, *Abbott* v. *Railway Express Agency*, 108 F. 2d 671 (4 Cir. 1940).

A motion for judgment n.o.v. may only be denied if there is some *substantial basis* in the evidence in support of the verdict, *Collins* v. *Craven*, 52 F.R.D. 146 (1971). What constitutes a substantial basis for denying a motion for judgment n.o.v. is aptly set forth in *Houston Chronicle Publishing Co.* v. *United States*, 481 F. 2d 1240 (5 Cir. 1973), cert. den. 94 S. Ct. 867. As stated on Page 1264 of 481 F. 2d, the motion should be denied:

> "* * * if there is substantial evidence opposed to the motions, that is evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions."

As stated by Judge Griesa in his opinion, "there was not the slightest evidence" of such negligence (Appendix p. 22a), and Appellant has not printed any such evidence in its Appendix.

There was simply no proof at all in this record that in selecting AINSLIE to manufacture and export pack the antennas GTE did so with knowledge that AINSLIE would not or could not properly pack them for export. Accordingly, GTE was entitled to judgment in its favor on the claim that it was negligent in contracting with AINSLIE, *Leahy* v. *Botnick*, 35 A.D. 2d 898, 315 N.Y.S.2d 700 (1970). Where, as here, there is a complete absence of probative evidence to support a verdict for the non-movant, judgment n.o.v. should be granted, *Armstrong* v. *Commerce Tankers Corp.*, 423 F. 2d 957, 959 (2 Cir. 1970).

It is further to be remembered that it is fundamental common law that one is not liable for the negligent act of an independent contractor such as AINSLIE, see *Moore* v. *Charles T. Wells Inc.*, 250 N.Y. 426, 428 (1929); *Ahbol* v. *Harden Co.*, 265 N.Y. 564 (1934); *Zucchelli* v. *City Construction Co.*, 4 N.Y. 2d 52 (1958). Indeed, even where one has general supervisory power over the work being done by an independent contractor, he is still not liable for the negligence of such independent contractor, see *Broderick* v. *Caldwell-Wingate Co. Inc.*, 301 N.Y. 182, 197 (1950); *Mullitan* v. *Caldwell-Wingate Co.*, 18 A.D. 2d 887; and *Grant* v. *Rochester Gas & Electric Corp.*, 20 A.D. 2d 48.

This common law concept that one is not liable for the negligence of an independent contractor is also to be found in the maritime law. Thus, for example, a shipowner is not liable for and it does not have the duty to actively supervise the work of stevedores or other shoreside contractors, *Albanese* v. *N.V. Nederl.*, 346 F. 2d 481, 483 (2 Cir. 1965), rev. on other grounds 382 U.S. 283; and *Filipek* v. *Moore-McCormack Lines*, 258 F. 2d 734 (2 Cir. 1958), cert. den. 359 U.S. 927. One is not responsible for the instrumentalities adopted or the methods used in the performance of the work by an independent contractor, *Cornec* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497 (4 Cir. 1931); and *Gaeta* v. *Compagnie* 359 F. Supp. 493, 496 (S.D.N.Y. 1973).

As this Court said in *Gallagher* v. *United States Lines Co.*, 206 F. 2d, 177, 179 (2 Cir. 1964), cert. den. 346 U.S. 89. .

> "Thus, a general ability to control the work in order to insure that it is satisfactorily completed in accordance with the requirements of the contract does not of itself make the hirer of an independent contractor

> liable for harm resulting from negligence in conducting the details of the work."

Accordingly, even the jury finding that AINSLIE was negligent (a finding of dubious legal significance in view of the fact that AINSLIE was not a party to this action and never had an opportunity to appear and defend itself) offers no basis for the imposition of liability on the part of GTE.

Nor does it serve any purpose to confuse, as Appellant does, a shipowner's warranty obligation to provide a seaworthy vessel—a species of liability without fault—with a shipper's liability which must be predicated upon fault, COGSA, 46 USCA § 1304(3), and see *Williamson* v. *Compania,* 446 F.2d 1339 (2 Cir. 1971).

Notwithstanding its efforts to impose a greater duty upon a purchaser of goods than the Trial Judge found to be permitted by statute and law, the Appellant shipowner cites not one single case that imposes such a duty. In no way whatsoever does the Appellant shipowner demonstrate any legal error in Judge Griesa's ruling (Appendix p. 22a):

> "To impose a duty upon a purchaser of goods to exercise surveillance over the packaging by the seller would be a totally unjustified interference with normal and sound commercial practice."

It is not without significance that the Appellant shipowner cites no authority to dispute such ruling. When one considers the many years in which commerce has existed, the absence of any precedent in support of the Appellant's position speaks volumes about the same.

In the final analysis what the Appellant shipowner here seeks to accomplish is to avoid an insurable business risk by having the Court impose an insurer's obligation upon

all persons who purchase goods or who deal with independent contractors. The ramifications of such a radical change in law boggle the mind.

CONCLUSION

Appellant has the burden of showing upon this appeal that the proof on trial established a *prima facie* case of negligence on the part of GTE. The holding by Judge Griesa that there was no such proof is eminently correct, and the fact that Appellant's Appendix prints no such proof is not without significance.

And, contrary to what the Appellant seems to suggest, the purchaser of goods is under no legal duty to exercise surveillance over the packaging of those goods by the seller; and the absence of contrary authority in the Appellant's brief is also not without significance.

The judgment of the Court below should be affirmed.

Respectfully submitted,

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